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No. 94-1656

In The

Supreme Court of the United States

October Term, 1994

FARMERS INSURANCE COMPANY, INC.,

Petitioner,

vs.

JOSEPH JABBOUR,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Oklahoma

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Is the dismissal of an appeal by the Oklahoma Supreme Court a final order which gives this Court jurisdiction to hear this matter when the appeal was not dismissed on the merits but was dismissed as premature and a federal issue has not been finally decided and later state appellate review could be had of the federal issue?

2. Does the Oklahoma Uniform Arbitration Act combined with the McCarran-Ferguson Act operate to exempt the application of the Federal Arbitration Act to insurance contracts in Oklahoma when the Oklahoma Uniform Arbitration Act specifically excludes arbitration clauses in insurance contracts from enforceability?

3. Does the Supremacy Clause require that a state appellate court accept the appeal of a state trial court's interlocutory order which is not appealable when the appealing party has failed to properly invoke the original jurisdiction of the state appellate court which is available to the appellant?

4. Is an appraisal clause in an automobile insurance contract the same as an arbitration clause when Oklahoma common law restricts appraisals to determining the amount in controversy and provides that denial of liability waives the right to invoke the appraisal clause and the Oklahoma Constitution prohibits its enforceability?

LIST OF PARTIES

Petitioner:

Farmers Insurance Company, Inc.

Respondent:

Joseph Jabbour

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RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF JURISDICTION

The Respondent disagrees that 28 U.S.C. § 1257(a) (1993) confers jurisdiction to this Court to decide the matters proffered by Petitioner. Title 28 U.S.C. § 1257(a) (1993) only confers jurisdiction when there has been a final judgment or decree "rendered by the highest court of a state in which a decision could be had." In the case at bar the Order of the Oklahoma Supreme Court about which Petitioner complains is not a final order nor does it finally decide any federal issue. The substantive portion of the order in its entirety is:

> Appellee's motion to dismiss is granted and this appeal is dismissed. The trial court's order, refusing to confirm an appraisal award in a case arising out of an insurance contract, is not an interlocutory prejudgment order appealable by right. Insurance contracts are specifically excluded from the Oklahoma Arbitration Act. See 15 O.S. 1991 § 802A(A). Interlocutory orders appealable by right are limited to those expressly identified by an Oklahoma statute. *Reams v. Tulsa Cable Television, Inc.*, 604 P.2d 373 (Okl. 1979).
>
> Appellant's request that the original petition in error be recast as an application to assume original jurisdiction and petition for writ of mandamus is denied.
>
> DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE THIS 10TH DAY OF JANUARY, 1995.

The Oklahoma Supreme Court only decided that the trial court's interlocutory order was not appealable and that petitioner had prematurely appealed. The Oklahoma Supreme Court noted that the Oklahoma Arbitration Act specifically excludes insurance contracts from its requirements. Nothing was mentioned concerning a federal issue. No federal issue was finally decided by the Oklahoma Supreme Court.

The United States Supreme Court does not have jurisdiction to review interlocutory judgments unless a federal claim has been finally decided *and* later review of the federal issue could not be had regardless of the outcome of the case. *Pennsylvania v. Ritchie, Pa.*, 107 S. Ct. 989, 480 U.S. 39, 94 L. Ed. 2d 40 (1987).

Petitioner admits that the trial court's order was an interlocutory order. (Pet. for Cert. 8). Petitioner also admits it will be afforded state court appellate review of the federal issue. (Pet. for Cert. 12). Consequently, Petitioner has freely admitted that this matter does not qualify for the exception to this Court's lack of jurisdiction to review an interlocutory state court order.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the constitutional and statutory provisions cited by Petitioner and included in Petitioner's appendix to its Petition for Certiorari, Respondent relies on the following:

Okla. Stat. Ann. tit. 15 § 802(A) (West 1993) which states:

> A. This act shall apply to a written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties. Such agreements are valid, enforceable and irrevocable, except upon such grounds as exist at law or in equity for the revocation of any contract. This act shall not apply to collective bargaining agreements or contracts with reference to insurance except for those contracts between insurance companies.

Okla. Stat. Ann. tit. 36, § 1250.8 (West Supp. 1995) (App., *infra*, 1a-4a).

Okla. Const. art. 2, § 19 which provides in pertinent part:

> The right of trial by jury shall be and remain inviolate. . . .

Okla. Const. art. 23, § 8 which provides in pertinent part:

> Any provision of a contract, express or implied, made by any person, by which any of the benefits of this Constitution is sought to be waived, shall be null and void.

STATEMENT OF THE CASE

In June of 1989, Respondent, Joseph Jabbour, purchased an insurance policy from the Petitioner which provided comprehensive and collision coverage for his 1984 Porsche. That policy of insurance contained the following language:

> You or we may demand appraisal of the **loss.** Each will appoint and pay a competent and disinterested appraiser and will equally share other appraisal expenses. The appraisers, or a judge of a court having jurisdiction, will select an umpire to decide any differences. Each appraiser will state separately the actual cash value and the amount of **loss.** An award in writing by any two appraisers will determine the amount payable, which shall be binding subject to the terms of the insurance.

(Emphasis supplied).

In July, 1989, Mr. Jabbour suffered a loss to his 1984 Porsche, including collision damages and theft damages. These losses were covered under the comprehensive and collision coverage of the policy issued to Mr. Jabbour by Petitioner.

Mr. Jabbour made a claim under the policy for his damages. Petitioner denied liability for a large portion of the theft damages.

Mr. Jabbour could not resolve the amount of the claim with Petitioner, so on September 7, 1989, he filed a lawsuit in the District Court of Tulsa County, Oklahoma seeking $15,000 for the collision damage and $10,390.75 for theft damages.

Respondent entered its appearance, offered to confess judgment in the amount of $15,275 and answered Mr. Jabbour's petition by denying liability for the majority of the theft loss, denying Mr. Jabbour's allegations of the amount of damages and requesting appraisal pursuant to a provision in the comprehensive and collision portion of Mr. Jabbour's insurance policy.

Mr. Jabbour amended his petition in February, 1991 to state a cause of action for bad faith against Petitioner. Petitioner removed the action to the United States District Court, Northern District, Oklahoma, which thereafter remanded the case to state court on June 12, 1991.

In June, 1992 Petitioner filed a motion to stay and to require an appraisal of Mr. Jabbour's loss. On August 19, 1992, the Tulsa District Court granted Petitioner's motion without comment. On January 22, 1993 the Tulsa County District Court ordered Mr. Jabbour to name an appraiser. On January 10, 1994, the appraisers and an umpire selected by the appraisers valued Mr. Jabbour's loss at $18,500 minus a $500 deductible for a total of $18,000.

Representatives for both Petitioner and Mr. Jabbour signed a memorandum memorializing the appraisal and specifically reserving to each all rights under the policy. Petitioner then paid Mr. Jabbour $18,000 without condition and moved the Tulsa County District Court for an order confirming the appraisal "award."

Mr. Jabbour then filed his second amended petition seeking contractual damages over and above the $18,000 paid by Petitioner and damages for bad faith.

The Tulsa County District Court denied Petitioner's motion to confirm the appraisal "award" and Petitioner attempted to appeal this interlocutory order to the Oklahoma Supreme Court. The Oklahoma Supreme Court dismissed the appeal because the Tulsa County District Court's denial of Petitioner's motion to confirm the appraisal "award" was an interlocutory order not appealable as of right under Oklahoma law.

Petitioner has now petitioned this Court for Certiorari contending that the Oklahoma Supreme Court's dismissal of Petitioner's untimely appeal was a final order reviewable by this Court.

Mr. Jabbour asserts, as Petitioner admits, that the Oklahoma Supreme Court's order dismissing Petitioner's untimely appeal is not a final order, nor does it preclude state appellate review of Petitioner's alleged federal issue.

REASONS FOR DENYING THE WRIT

Assuming, *arguendo,* that this Court has jurisdiction, Petitioner has asserted no sound reason for this Court to grant certiorari.

Petitioner cites *Miller v. Nat. Fid. Life Ins. Co.*, 588 F.2d 185 (1979) and *Hart v. Orion Ins. Co.*, 453 F.2d 1358 (10th Cir. 1971) for the proposition that the McCarran-Ferguson Act, 15 U.S.C. §§ 1012 *et seq.*, does not apply in this case. However, both of the cited cases actually stand for the proposition that the McCarran-Ferguson Act will prohibit imposition of federal law where state law regulating insurance will be invalidated, impaired, or

superseded. In those particular cases, no specific statutes were shown to be invalidated by application of federal law.

Recently, the Tenth Circuit has addressed a strikingly similar situation as the one presented to this Court in the case at bar. In *Mutual Reinsurance Bureau v. Great Plains Mut. Ins. Co., Inc.*, 969 F.2d 931 (10th Cir.), *cert. denied*, __ U.S. __, 113 S. Ct. 604, 121 L. Ed. 2d 540 (1992), the Tenth Circuit was faced with a Kansas arbitration statute which specifically excluded insurance contracts from arbitration. Just as Petitioner argues in the case at bar, it was argued that the Kansas arbitration statute did not regulate insurance. It was argued that because the arbitration statute was not a part of the Kansas insurance code that it did not directly or indirectly regulate insurance. The cases relied upon for this argument were the same which Petitioner relies upon in the case at bar. However, the Tenth Circuit disagreed and specifically stated:

> The statutes at issue in Hart and Hamilton differ from K.S.A. § 5-401 in one very important respect in that those statutes governed arbitration in general and did not mention "contracts of insurance." The trial court noted as to Hart that the statute there considered did not contain the exception "contracts of insurance," but apparently concluded that made no difference. Section 5-401 as it now exists expressly excludes contracts of insurance from arbitration and therefore it is not comparable to the statutes in Hart and Hamilton.

Mutual Reinsurance Bureau v. Great Plains Mt. Ins. Co., Inc., 969 F.2d at 934.

The Tenth Circuit went on to find that because the Kansas arbitration statute expressly excluded contracts of insurance, that it directly regulated the terms of insurance contracts and would be exempt from the Federal Arbitration Act because of the McCarran-Ferguson Act.

> For the application of the McCarran-Ferguson Act it is not necessary, as the Appellee urges, that the state statute "regulate the business of insurance" be in the form of an insurance code or an act relating only to insurance. The application of the Kansas statute here concerned to insurance as an exception is clear and direct although included in an act relating basically to arbitration.
>
> It is apparent that the Federal Arbitration Act is significant legislation to provide for the enforcement of arbitration agreements and to express an important policy favoring arbitration. See Dean Witter Reynolds v. Byrd, 470 U.S. 213, 105 S. Ct. 1238, 84 L. Ed. 2d 158 (1985). However, in our view the Kansas statute combined with the McCarran-Ferguson Act prevents its application.

Mutual Reinsurance Bureau at 934-935.

Just as in the Kansas arbitration statute, insurance contracts are specifically excluded from the Oklahoma Uniform Arbitration Act:

> A. This act shall apply to a written agreement to submit any existing controversy to

> arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties. Such agreements are valid, enforceable and irrevocable, except upon such grounds as exist at law or in equity for the revocation of any contract. *This act shall not apply to collective bargaining agreements or contracts with reference to insurance except for those contracts between insurance companies.*

(Emphasis added). Okla. Stat Ann. tit. 15 § 802(A) (West 1993).

Imposition of federal law will cause the specific legislative intent to exclude arbitration clauses in insurance contracts from enforceability to be superseded. This violates the McCarran-Ferguson Act.

In an even more recent case, the Third Circuit was concerned with the application of the Federal Trade Commission Act to alleged price-fixing in title search fees for title insurance companies. The Third Circuit explained *Mutual Reinsurance Bureau:*

> The challenged statute in Mutual Reinsurance, however, as in Gahn, directly regulated a term of the insurance contract, unlike the regulatory schemes at issue here. Although arbitration clauses are not unique to insurance contracts, Ticor fails to recognize that the state statute in question in Mutual Reinsurance did not generally prohibit arbitration clauses. Rather, the statute at issue made such clauses unenforceable only when contained in insurance contracts.

Ticor Title Ins. Co. v. Federal Trade Comm., 998 F.2d 1129, 1135 (3rd Cir. 1993).

Clearly, state arbitration statutes which specifically exclude insurance contracts are statutes directly regulating the terms of insurance contracts. Therefore, such statutes regulate the business of insurance and because of the exemption created by the McCarran-Ferguson Act, the Federal Arbitration Act would not preempt the state statute.

It is equally clear that should the contrary be allowed, insurers like Petitioner would be able to make all matters of dispute in insurance policies subject to arbitration. Oklahoma's statutes regulating claims procedures would effectively be repealed. For example, in the case at bar, the claim made by Mr. Jabbour is a claim for the total loss of a motor vehicle. Under the terms of the *appraisal* clause in the policy, Petitioner can at any time invoke the appraisal method for resolving the dispute.

However, Oklahoma has long had a statute which expressly governs the claims process of an insurer in case of total loss of a motor vehicle. Okla. Stat. Ann. tit. 36, § 1250.8 (West Supp. 1995) (previously, Okla. Stat. Ann. tit. 36, § 1257). Should Petitioner be able to use the Federal Arbitration Act to supersede the Oklahoma Uniform Arbitration Act, the requirements of Section 1257 are invalidated, impaired and superseded. This violates the McCarran-Ferguson Act. *See also,* Unfair Claims Settlement Practices Act, Okla. Stat. Ann. tit. 36, §§ 1250.1 *et seq.* (West Supp. 1995).

I.

SUPREMACY CLAUSE

Oklahoma law does not allow the appeal as of right of the

interlocutory trial court order in the case at bar. Oklahoma does allow for review of certain interlocutory orders affecting substantial rights by original action in the Oklahoma Supreme Court. However, the Supremacy Clause to the United States Constitution does not create appellate jurisdiction in a state appellate court where none otherwise existed. *Mclin v. Trimble,* 795 P.2d 1035, 1040 (Okla. 1990).

Petitioner never used the proper method to obtain original jurisdiction in the Oklahoma Supreme Court. Instead, Petitioner attempted to appeal an unappealable interlocutory order. This is why the Oklahoma Supreme Court dismissed Petitioner's appeal. (page 2, *supra*).

II.

APPRAISAL CLAUSE IS NOT ARBITRATION

The provision in the insurance contract at issue is not an arbitration clause at all. It is an *appraisal* clause. That there is a difference between an appraisal clause and an arbitration clause is borne out by the insurance contract itself. Under the uninsured motorist portion of the policy there is a clearly worded arbitration clause. It is titled "Arbitration." (Arbitration, App., *infra,* 5a-6a).

The *arbitration* clause in the uninsured motorist section of the policy is demonstrably different from the *appraisal* clause in the comprehensive and collision section of the policy. (*See* page 4, *supra*). Had the Petitioner intended that appraisal be the equivalent of arbitration, these sections would not have different titles and substance. It is clear Petitioner intended there to be a difference between appraisal and arbitration.

Furthermore, Oklahoma common law clearly establishes that appraisal provisions only apply to determining the value of a claim and that when an insurer denies liability, it waives whatever

right it has to appraisal under the contract. *Massey v. Farmers Ins. Group*, 837 P.2d 880, 882 (Okla. 1992). Petitioner in this case has denied liability for the majority of the theft loss claim for stereo equipment. In paragraph No. 6 of Petitioner's Answer to Mr. Jabbour's Petition it was alleged:

> 6. That Plaintiff's custom stereo system installed in the vehicle was only covered under the insurance policy in question to the extent that it was installed in the normal factory openings for sound reproducing equipment. That the majority of plaintiff's custom stereo system was not so installed; therefore, those components of said system are excluded from coverage under the terms of the policy in question.

Therefore, pursuant to Oklahoma common law, upon which Petitioner is relying, Petitioner waived its right to appraisal by denying liability for a major portion of the claim.

III.

OKLAHOMA CONSTITUTION

The Constitution of the State of Oklahoma expressly prohibits the enforceability of contracts purporting to restrict constitutional rights. Okla. Const. art, 23, § 8 which provides in pertinent part:

> Any provision of a contract, express or implied, made by any person, by which any of the benefits of this Constitution is sought to be waived, shall be null and void.

As such, the appraisal provision in this matter violates

Article 23, § 8 by restricting Mr. Jabbour's right to a trial by jury which is embodied in Okla. Const. art. 2, § 19 which provides in pertinent part:

> The right of trial by jury shall be and remain inviolate. . . .

CONCLUSION

Petitioner has failed to demonstrate to this Court that it has jurisdiction when there has been no final order of Oklahoma's highest court and when federal rights have not been decided by the Oklahoma Supreme Court and Petitioner has access to Oklahoma appellate courts regarding its purported federal issue. Assuming, *arguendo,* that this Court has jurisdiction, Oklahoma's Uniform Arbitration Act explicitly excludes arbitration clauses in insurance contracts from enforceability. This statute combined with the McCarran-Ferguson Act, exempts insurance contracts from application of the Federal Arbitration Act. Petitioner has waived its right to appraisal under Oklahoma common law by denying liability for a major portion of the claim. The subject appraisal provision violates the Oklahoma Constitution. For all these reasons the Petition for Certiorari must be denied.

Respectfully submitted,

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APPENDIX A — OKLAHOMA STAT. ANN. TIT. 36, § 1250.8 (WEST SUPP. 1995)

§ 1250.8 Motor vehicle total loss or damage claim

A. If an insurance policy or insurance contract provides for the adjustment and settlement of first party motor vehicle total losses, on the basis of actual cash value or replacement with another of like kind and quality, one of the following methods shall apply;

1. An insurer may elect to offer a replacement motor vehicle which is a specific comparable motor vehicle available to the insured, with all applicable taxes, license fees, and other fees incident to the transfer of evidence of ownership of the motor vehicle paid, at no cost to the insured other than any deductible provided in the policy. The offer and any rejection thereof shall be documented in the claim file; or

2. An insured may elect a cash settlement based upon the actual cost, less any deductible provided in the policy, to purchase a comparable motor vehicle, including all applicable taxes, license fees and other fees incident to a transfer of evidence of ownership, or a comparable motor vehicle. Such cost may be determined by:

a. the cost of a comparable motor vehicle in the local market area when a comparable motor vehicle is available in the local market area,

b. one of two or more quotations obtained by an insurer from two or more qualified dealers located within the local market area when a

comparable motor vehicle is not available in the local market area, or

c. the cost of a comparable motor vehicle as quoted in the latest edition of the National Automobile Dealers Association Official Used Car Guide.

B. If a first party motor vehicle total loss is settled on a basis which deviates from the methods described in subsection A of this section, the deviation shall be supported by documentation giving particulars of the condition of the motor vehicle. Any deductions from such cost, including, but not limited to, deduction for salvage, shall be measurable, discernible, itemized and specified as to dollar amount and shall be appropriate in amount. The basis for such settlement shall be fully explained to a first party claimant.

C. If liability for motor vehicle damages is reasonably clear, insurers shall not recommend that third party claimants make claims pursuant to the third party claimants' own policies solely to avoid paying claims pursuant to such insurer's insurance policy or insurance contract.

D. Insurers shall not require a claimant to travel unreasonably either to inspect a replacement motor vehicle, obtain a repair estimate or have the motor vehicle repaired at a specific repair shop.

E. Insurers shall, upon the request of a claimant, include the deductible of a first party claimant, if any, in subrogation demands. Subrogation recoveries shall be shared on a proportionate basis with a first party claimant, unless the

deductible amount has been otherwise recovered. No deduction for expenses shall be made from a deductible recovery unless an outside attorney is retained to collect such recovery. The deduction shall then be made for only a pro rata share of the allocated loss adjustment expense.

F. If an insurer prepares an estimate of the cost of automobile repairs, such estimate shall be in an amount for which it reasonably may be expected that the damage can be repaired satisfactorily. An insurer shall give a copy of an estimate to a claimant and may furnish to the claimant the names of one or more conveniently located repair shops, if requested by the claimant.

G. If an amount claimed is reduced because of betterment or depreciation, all information for such reduction shall be contained in the claim file. Such deductions shall be itemized and specified as to dollar amount and shall be appropriate for the amount of deductions.

H. An insurer or its representative shall not require a claimant to obtain motor vehicle repairs at a specific repair facility. An insurer or its representative shall not require a claimant to obtain motor vehicle glass repair or replacement at a specific motor vehicle glass repair or replacement facility. An insurer shall fully and promptly pay for the cost of the motor vehicle repair services or products, less any applicable deductible amount payable according to the terms of the policy. The claimant shall be furnished an itemized priced statement of repairs by the repair facility at the time of acceptance of the repaired motor vehicle. Unless a cash settlement is made, if a claimant selects a motor vehicle repair or motor vehicle glass repair or replacement facility, the insurer shall provide payment

to the facility based on a competitive price, as established by that insurer through market surveys or by the insured through competitive bids at the insured's option, to determine a fair and reasonable market price for similar services. Reasonable deviation from this market price is allowed based on the facts in each case.

I. An insurer shall not use as a basis for cash settlement with a first party claimant an amount which is less than the amount which an insurer would pay if repairs were made, other than in total loss situations, unless such amount is agreed to by the insured.

J. An insurer shall not force a claimant to execute a full settlement release in order to settle a property damage claim involving a personal injury.

K. All payment or satisfaction of a claim for a motor vehicle which has been transferred by title to the insurer shall be paid by check or draft, payable on demand.

L. As used in this section, "total loss" means that the vehicle repair costs plus the salvage value of the vehicle meets or exceeds the actual cash value of the motor vehicle prior to the loss, as provided in used automobile dealer guidebooks.

Laws 1986, c. 251, § 19 eff. Nov. 1, 1986. Amended by Laws 1987, c. 175, § 12, eff. Nov. 1, 1987; Laws 1993, c. 225, § 1, eff. Sept. 1, 1993. Renumbered from § 1257 of this title and amended by Laws 1994, c. 342, §§ 8, 20, eff. Sept. 1, 1994.

APPENDIX B — EXCERPT FROM "PART II - UNINSURED MOTORIST" OF FARMERS INSURANCE COMPANY'S POLICY OF INSURANCE ISSUED TO JOSEPH JABBOUR, TITLED "ARBITRATION"

* * *

Arbitration

If an **insured person** and we do not agree (1) that the person is legally entitled to recover **damages** from the owner or operator of an **uninsured motor vehicle,** or (2) as to the amount of payment under this part, either that person or we may demand that the issue be determined by arbitration.

In that event, an arbitrator will be selected by the **insured person** and us. If agreement on an arbitration cannot be reached within (30) days, the judge of a court having jurisdiction will appoint the arbitrator. The expense of the arbitrator and all other expenses of arbitration will be shared equally. Attorney's fees and fees paid for the witnesses are not expenses of arbitration and will be paid by the party incurring them.

The arbitrator shall determine (1) the existence of the operator of an **uninsured motor vehicle,** (2) that the **insured person** is legally entitled to recover **damages** from the owner or operator of an **uninsured motor vehicle,** and (3) the amount of payment under this part as determined by this policy or any other applicable policy.

Arbitration will take place in the county where the **insured person** lives. Local court rules governing procedures and evidence will apply. The decision in writing of the arbitrator will be binding subject to the terms of this insurance.

Appendix B

If agreement by arbitration is not reached within three months from the date of demand, you may bring action against anyone responsible for use of the vehicle involved in the **accident.**

(emphasis supplied)